

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.

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Docket No. ER14-2440-000

NOTICE OF INTERVENTION AND COMMENTS OF THE
MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES

Pursuant to Rule 214(a)(2) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.214(a)(2), and the Commission’s July 16, 2014 Combined Notice of Filings #1, the Department of Public Utilities of the Commonwealth of Massachusetts (“MA DPU”) hereby files its Notice of Intervention and provides comments in the above-captioned matter. This proceeding relates to the filing made on July 16, 2014, by ISO New England Inc. (“ISO-NE”) regarding proposed Tariff¹ revisions to the Forward Capacity Market (“FCM”) rules to allow a new capacity resource to seek a one-year deferral of the start of its Capacity Supply Obligation (“CSO”) (“Rule Changes”).²

¹ Capitalized terms not defined in this filing are intended to have the meaning given to such terms in the ISO-NE Transmission, Markets and Services Tariff (“Tariff”).

² ISO New England Inc., Revisions to Allow a Non-Commercial Capacity Resource to Seek a One-Year Deferral, Docket No. ER14-2440-000 (filed July 16, 2014) (“Filing”).

I. COMMUNICATIONS

The MA DPU requests that the individuals identified below be placed on the Commission's official service list in this proceeding and that all communications related to this filing and future filings in this proceeding should be directed to:

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II. INTERVENTION

The MA DPU is the agency of the Commonwealth of Massachusetts charged with general regulatory supervision over gas and electric companies in Massachusetts and has jurisdiction to regulate rates or charges for the sale of electric energy and natural gas to consumers.³ Therefore, the MA DPU is a "state commission" as defined by 16 U.S.C. § 796(15) and 18 C.F.R. § 1.101(k). This notice of intervention has been filed within the period established under Rule 210(b). Accordingly, the MA DPU hereby intervenes in this proceeding pursuant to Rule 214(a)(2).

III. BACKGROUND

Under the current FCM rules, a new capacity resource that has received a CSO through the Forward Capacity Auction ("FCA") has 39 months to complete its permitting, financing,

³ Massachusetts General Laws c. 164, § 76 et seq.

and construction processes and become commercial by its Capacity Commitment Period.⁴ If the resource is not going to be commercial by the Capacity Commitment Period, ISO-NE can request that the Commission terminate the resource's CSO.⁵ If ISO-NE chooses not to seek termination or the Commission does not grant such a request, then the resource will be responsible to "cover" its CSO through arrangements with suitable substitute resources.⁶ If the new capacity resource does not cover its CSO, then it will receive its full CSO payment and be subject to Shortage Event penalties.⁷

Under the proposed Rule Changes, a new capacity resource can seek a one-year deferral of its CSO in a very limited and well-defined set of circumstances. First, ISO-NE would have to determine that the resource is needed for reliability.⁸ If ISO-NE determines that it is, then the new capacity resource may file with the Commission seeking a deferral.⁹ In the filing, the new capacity resource has to demonstrate that the deferral is critical to its ability to become commercial and that the reasons the deferral is being sought were beyond the control of the new capacity resource.¹⁰

If the Commission grants the deferral, all of the rights, obligations, payments, and charges associated with the CSO will be delayed one year.¹¹ If a resource elected to lock in its

⁴ Filing at 1.

⁵ Id. at 5.

⁶ Id.

⁷ Id.

⁸ Id. at 6-7.

⁹ Id. at 7.

¹⁰ Id.

¹¹ Id. at 8.

FCA clearing price for multiple years, then it will still receive the clearing price for the number of years for which it had originally locked in the price.¹²

IV. COMMENTS

The MA DPU supports ISO-NE's proposed Rule Changes for two main reasons. First, the Rule Changes are necessary for reliability in New England and the viability of the FCM. Second, the MA DPU has an interest in the adoption of these changes for their local reliability benefits because we anticipate that these Rule Changes will apply to a new capacity resource with a CSO for the Northeast Massachusetts/Boston Capacity Zone ("NEMA/Boston").

A. The Rule Changes Are Necessary for the Reliability of the System and the Viability of the FCM

ISO-NE has observed that in some circumstances the 39-month planning period may not be sufficient for a new capacity resource to become commercial.¹³ The MA DPU agrees that under the current rules there are cases in which the planning period is not sufficient for reasons beyond the control of a new capacity resource, such as permitting delays and appeals. The MA DPU finds that because of that and the related reliability concerns, the accommodation for such circumstances afforded by the Rule Changes is necessary.

The MA DPU does not support the Rule Changes lightly. We agree with the concerns raised by some that, as a general rule, we should not make changes to the market that apply retroactively and that the integrity of the market is threatened by constantly changing market rules. However, the MA DPU believes that experience has shown that additional time may be required for new generation resources to become operational beyond what is contained in the current rules. ISO-NE has pointed out that at least one new capacity resource with a CSO very

¹² Id. at 8.

¹³ Id. at 1.

likely needed for reliability, Footprint Power,¹⁴ will not be in service at the beginning of its Capacity Commitment Period and, without the Rule Changes, will not get financing to become commercial for the following Capacity Commitment Period.¹⁵

The viability of the market and the reliability of the system rest on the ability to attract new entry. New capacity resources, especially large generation resources, are dependent on the ability to secure financing. In order to secure financing, new capacity resources need to demonstrate to prospective lenders the likelihood of bringing projects to successful completion. If, under the system as currently designed, a new capacity resource is unable to be built through no fault of its own, then there is more at stake than the fate of just one resource: The viability of the whole FCM is called into question. Footprint Power is the first entirely new, large-scale generation resource, other than renewable projects that have other sources of funding, to be built in New England with revenues provided solely from the ISO-NE wholesale markets. In order to provide confidence to lenders and other developers that new generation can be built in New England, it is important that Footprint Power come to fruition. As New England continues to lose significant existing generation resources,¹⁶ it will become increasingly important that the viability of the FCM be proven.

Furthermore, the MA DPU is reassured that the conditions required for a deferral provide sufficient safeguards to protect the system from abuse of this option. Before a new

¹⁴ Footprint Power is a 692 MW quick-start, combined cycle gas-fired generation facility. Footprint Power received a CSO for 674 MW in FCA 7. However, with duct-burner firing in the summer, the plant would be capable of producing 692 MW.

¹⁵ See Filing at 4.

¹⁶ Four units representing almost 3,300 MW will retire over the next five years. ISO-NE, 2104 Regional Electricity Outlook at 15 (2014), available at: http://www.iso-ne.com/aboutiso/fin/annl_reports/2000/2014_reo.pdf.

capacity resource can request a deferral from the Commission, ISO-NE must first conduct a reliability review for two years: the first Capacity Commitment Period for which the resource has a CSO and the next Capacity Commitment Period.¹⁷ Only if ISO-NE determines that the resource is needed for reliability for both years can the new capacity resource apply for a deferral from the Commission. The new capacity resource has the burden of proof to demonstrate that the reasons the deferral is being sought are beyond the control of the resource and that the deferral is critical to the resource's ability to become commercial.¹⁸ Furthermore, interveners can object to the request for a deferral.¹⁹

An additional safeguard against abuse of the deferral option and for the protection of the system is that the Rule Changes do not change ISO-NE's right to request that the Commission terminate the CSO of the new capacity resource.²⁰ Even with a deferral, ISO-NE will still monitor the progress of a new capacity resource and, if ISO-NE finds that the resource is not making adequate progress towards its new Commercial Operation date, then ISO-NE may file with the Commission for termination of the CSO. This retains ISO-NE's ability to address the reliability need through an alternative means.²¹

The MA DPU concludes that the Rule Changes strike the appropriate balance between protecting the reliability of the system and ensuring the viability of the FCM. For these system-level reasons, the MA DPU supports the Rule Changes.

¹⁷ Filing at 7.

¹⁸ Id.

¹⁹ Id.

²⁰ Id. at 9.

²¹ Id.

B. The Rule Changes Are Necessary for Reliability in the NEMA/Boston Zone

The MA DPU also supports the Rule Changes because ISO-NE has determined that Footprint Power will very likely be needed for reliability in NEMA/Boston.²² In the FCA for the 2016-2017 Capacity Commitment Period (“FCA 7”), ISO-NE determined that the Local Sourcing Requirement (“LSR”) for NEMA/Boston was 3,209 MW.²³ FCA 7 procured 3,753 MW for NEMA/Boston, of which 674 MW represent the CSO for Footprint Power. Without the capacity to be supplied by Footprint Power, NEMA/Boston will be deficient by 130 MW for the 2016-2017 Capacity Commitment Period.²⁴ Without Footprint Power’s CSO in the subsequent Capacity Commitment Period, NEMA/Boston will be deficient by 282 MW.²⁵

According to ISO-NE, it is unlikely that there are any substitute resources available to cover Footprint Power’s CSO in NEMA/Boston.²⁶ ISO-NE asserts that any other resources acquired in future FCAs or transmission enhancements would become commercial much later than a new capacity resource that has cleared in a prior FCA even if a one-year deferral is

²² Id. at 4.

²³ Forward Capacity Market (FCA 7) Result Report, issued February 6, 2013, available at: http://www.iso-ne.com/markets/othrmkts_data/fcm/cal_results/ccp17/fca17/fca_7_result_report.pdf (“FCA 7 Results”).

²⁴ FCA 7 Results (this number is calculated by subtracting the number of MW for the Footprint Power CSO from the amount of MW that cleared in FCA 7 and then subtracting the LSR).

²⁵ Forward Capacity Market (FCA 8) Result Report, issued February 5, 2014, available at: http://www.iso-ne.com/markets/othrmkts_data/fcm/cal_results/ccp18/fca18/fca_8_result_report.pdf (this number is calculated by subtracting the number of MW for the Footprint Power CSO from the amount of MW that cleared in FCA 8 and then subtracting the LSR).

²⁶ Filing at 5.

granted.²⁷ This is because ISO-NE presumes that the new capacity resource that requested the deferral, which has not been terminated for missing its project development milestones, is well along in the development and permitting process.²⁸ Therefore, from a reliability standpoint, ISO-NE prefers that a new capacity resource in that situation that needs the full amount of its locked-in CSO payments to become commercial be given the deferral.²⁹ The MA DPU agrees with this rationale for preferring a FCA-cleared resource, such as Footprint Power, that is needed for reliability and farther along in the development and permitting process, to trying to rely on an unidentified new capacity resource that would be at the beginning of the process and could incur the same project delays as the FCA-cleared resource.

The MA DPU supports ISO-NE's proposal as a means to address threats to the reliability of the system in a way that does not penalize a new capacity resource for delays that were not its fault. Penalizing the new capacity resource in this situation may prevent what is an otherwise responsible resource from participating in the market and thus, prolong or worsen the threat to the system and, in this case, to NEMA/Boston. As mentioned above, a key factor in whether the deferral is granted is whether the delay in becoming commercial is the fault of the developer. The permitting and siting history for Footprint Power clearly illustrates how proposed generation facilities that are needed for reliability, and whose proponents work diligently and successfully to obtain necessary regulatory approvals, can face unforeseen delays beyond their control stemming from the numerous opportunities for appeal of local, state, and federal permits and approvals. Although the particular details of the siting process for

²⁷ Id. at 4.

²⁸ Id.

²⁹ Id. at 4, 6.

Footprint Power are unique to the facility, Footprint Power's experience reveals a general problem regarding the existing 39-month period between the award of the CSO and the required in-service date – one that would likely affect other generators as well in the future.

Over the past two-and-one-half years, Footprint Power has made timely progress on many fronts in permitting and developing its facility. Footprint Power began development and pre-permitting work well before it acquired the Salem Harbor Station site from Dominion Power on August 3, 2012 – the very same day it also filed a Petition to Construct with the Massachusetts Energy Facilities Siting Board (“EFSB”) and an Environmental Notification Form with the Massachusetts Environmental Policy Act office.³⁰ In short order, Footprint Power sought all additional local, state and federal permits and approvals necessary for construction of the facility. By February 20, 2014, some 18 months later, Footprint Power had received all such local, state, and federal permits and approvals following the issuance by the EFSB of a Certificate of Environmental Impact and Public Interest (“Certificate”), which is a composite of seven separate local and state permits.³¹

During the various regulatory and legislative proceedings regarding the Footprint Power proposal, numerous elected officials from the Salem area, as well as many residents and businesses, voiced their strong support for the proposed project.³² At public hearings and other venues, Footprint Power actively reached out to the relatively small number of individuals in the Salem community who were either skeptical about the proposal or opposed its

³⁰ Footprint Power Salem Harbor Development LP, EFSB 12-2, Exh. SHR-2 (2013).

³¹ See Footprint Power Salem Harbor Development LP, EFSB 13-2 at 26 (2014)

³² See Footprint Power Salem Harbor Development LP, EFSB 12-2 (2013); Transcript of EFSB Public Comment Hearing in Salem (September 9, 2012); Salem Harbor Plant Revitalization Task Force at 37-38 (2013), available at: <http://www.mass.gov/eea/docs/eea/salem-harbor/full-task-force-report.pdf>.

development. In addition, Footprint Power successfully negotiated a settlement agreement with the Conservation Law Foundation (“CLF”), which resulted in the withdrawal of an appeal of the EFSB’s Approval to Construct that CLF had filed with the Massachusetts Supreme Judicial Court.

Despite the CLF Settlement, four individual Salem residents have pressed forward with a separate appeal of the one permit the EFSB was unable to include in the Certificate due to federal pre-emption: the Prevention of Significant Deterioration (“PSD”) air permit.³³ Currently, the appeal of the PSD permit (that was issued by the Massachusetts Department of Environmental Protection (“MassDEP”) on January 30, 2014) is pending before the Environmental Appeals Board (“EAB”) of the U.S. Environmental Protection Agency, and the matter should be decided shortly. Under federal law, a pending PSD appeal (such as the one filed on March 3, 2014 regarding Footprint Power) stays the project applicant from beginning construction of the facility. For the past five months (and counting), Footprint Power has been prevented from moving forward with construction. Beyond the prohibition on construction while the PSD appeal is pending, the EAB appeal has also had the effect of delaying the completion of the project’s financing. Project financing typically depends on the resolution of significant regulatory and permit issues, such as the matter now pending before the EAB.

Absent the pending PSD appeal, which the MassDEP has asserted is without merit,³⁴ Footprint Power would still arguably be on track to meet its development schedule and CSO commitment of a June 1, 2016 in-service date. Unfortunately – and due to no fault of

³³ See Footprint Power Salem Harbor Development LP, EFSB 13-2 at 24 (2014).

³⁴ See In re Footprint Salem Harbor Development LP, U.S. Environmental Protection Agency Environmental Appeal Board, PSD Appeal No. 14-02, MassDEP’s Response to the Amended Petition for Review at 9 (April 8, 2013).

Footprint Power – this in-service date is no longer viable. We expect that ISO-NE’s Rule Changes would provide ample time for the pending PSD appeal to be resolved in Footprint Power’s favor and for Footprint Power to finalize project financing and other development requirements in short order.

As noted by ISO-NE, given that the Footprint Power facility remains essential to ensuring reliability in NEMA/Boston, we believe that the Rule Changes would address not only a “Footprint”/“Massachusetts” problem but a broader timing problem that would almost certainly confront other generators in the future. Without such Rule Changes, we foresee continuing conflicts between the timing requirements of the FCM and the realities of the siting and permitting process in Massachusetts, and presumably other New England states as well.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the MA DPU hereby files this Notice of Intervention and respectfully requests that the Commission recognize the MA DPU as an intervener in this proceeding, with all rights attendant thereto. In addition, for the reasons stated above, the MA DPU respectfully requests that the Commission consider our comments and approve ISO-NE's Rule Changes.

Respectfully submitted,
MASSACHUSETTS DEPARTMENT OF
PUBLIC UTILITIES

By its attorney,

/s/ Jennifer M. Murphy
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Date: August 6, 2014

CERTIFICATE OF SERVICE

In accordance with 18 C.F.R. § 385.2010 (2008), I hereby certify that I have this day served, via electronic mail or first class mail, the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings.

Dated at Boston, Massachusetts on this sixth day of August, 2014.

/s/ Jennifer M. Murphy
Jennifer M. Murphy